IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L098/2001

BETWEEN	RICHARD LEWIS	CLAIMANT
A N D	NORMA DUNN	DEFENDANT

Miss Alicia Thomas for Claimant/Respondent
instructed by K. C. Neita & Co.

Mrs. M. Georgia Gibson-Henlin for Defendant/Applicant
instructed by Miss Lovern A. George.

Application to set aside Judgment.

Heard: 7th, 14th, and 22nd June, 2004

BROOKS, J.

This is Miss Norma Dunn's second application to have the court set aside a final judgment entered against her on behalf of Mr. Richard Lewis.

Miss Dunn's first application was refused on May 20, 2004 by Sykes J. (Ag.) who reduced his reasons to writing.

The present application was filed on May 26, 2004 and is substantially in the same terms as those of the previous application. Miss Thomas on behalf of Mr. Lewis complains that this second application is an abuse of the process of the court. Mrs. Gibson-Henlin on behalf of Miss Dunn has sought

to justify it on the basis of new material being brought to the court's attention.

The issues for the court to decide therefore are firstly whether it ought to allow the application to be heard and secondly whether Miss Dunn has provided a sufficient basis to have the judgment against her set aside.

Ironically, since Miss Thomas did not make her complaint as a preliminary point both aspects were fully argued before me. I shall consider each one in turn.

Background to the Application

Mr. Lewis claim is for the payment of monies said to be due to him by Miss Dunn for construction work done by him at her request. It is common ground between the parties that the work was not completed. The Writ of Summons was filed on 22nd November 2001. The amount claimed is said to be based on a valuation of the work actually done.

An Interlocutory Judgment in default of appearance was entered on the 23rd May, 2002.

Damages were assessed on 6th October 2003 by Mangatal J. (Ag.) (as she then was) and a final Judgment entered on 6th February, 2004.

The first Application to Set Aside Judgment.

The first application to set aside the judgment was filed on 6th April 2004 and was supported by an affidavit by Miss Dunn. She denied any knowledge of the court action or of the judgment until 24th March 2004 when a bailiff attended her home to execute a Writ of Seizure and Sale in pursuance of the judgment.

Because of the denial of the service of the various items of process, Sykes J. (Ag.) heard oral evidence on cross-examination from Miss Dunn as well as two process officers who deposed that they had each personally served Miss Dunn on separate occasions.

The learned judge found that Miss Dunn was not being truthful as to the lack of knowledge of the court action and accepted that not only had she been served personally with documents but that "she knew of the judgment from either late 2002 or early 2003". In the context the learned judge was speaking about the interlocutory judgment. The thrust of the submissions at that time was in respect of rule 13.3 of the Civil Procedure Rules 2002 ("the CPR"). The learned judge conducted his analysis of the situation against the background of rule 13.3 being the applicable rule.

Can a second application be properly made?

Mrs. Gibson-Henlin has submitted that the court should hear this present application because the thrust of the submissions in support of this application focuses not on the interlocutory judgment and rule 13.3 but instead on the final judgment and rule 39.6. She has referred to the case of Gordon & Gordon v Vickers & Vickers (1990) 27 JLR 60, as authority for the proposition that second and subsequent applications to set aside a default judgment are allowed.

Rowe P. in delivering the judgment of the Court of Appeal in that case also cautioned that the court had the power to curb an abuse of its process. He warned that a Defendant in default could not properly make "repeated applications to have (the default judgment) set aside without adducing new relevant facts". (p. 63 H).

Miss Thomas in opposition submitted:

(a) that the principle concerning repeated applications was restricted to judgments in default and therefore inapplicable to this case which concerns a final judgment, and,

(b) there are neither new facts nor new law to be adduced in this matter; the notice of the application is in the same terms as

before and there has been no change in the law since the last application.

The Gordon and Vickers case (supra) does not support Miss Thomas' submission. Their Lordships in that case reiterated the principle enunciated in Evans v Bartlam [1937] A.C. 473; that until a case was determined on its merits, the court had the power to revoke its judgment or order. In a thorough examination of the principle their Lordships in the Gordon and Vickers case showed that it applied (among other things) to *ex parte* orders as well as to applications for extension of time to file a record of appeal.

In my view the principle clearly applies in an appropriate case to applications to set aside a default final judgment.

On the issue as to whether there is new material to be presented I am prepared to give Miss Dunn the benefit of the following *dicta* from the judgment of Master Chambers in General Motors Corporation v Canada West Indies Shipping Co. Ltd. as cited by Rowe P. at P63 F-G of his judgment in Gordon & Vickers :

> "To put it another way, the court may in the exercise of its discretion relieve the Defendant of the 'punishment meted out to him ... provided he begs, prays or pleads in the proper manner whether it took him two or more occasions to beg or pray properly..."

I shall allow this application to be made on the basis that Miss Dunn's Attorneys did not cite rule 39.6 to Sykes J. and that they should be allowed to bring the provisions of that rule to the attention of the court.

Has Miss Dunn provided a sufficient basis to have the judgment against her set aside?

In support of the application Miss Dunn now stresses the reason why she was absent from the hearing of the assessment of damages. The reason however is the same reason given in her application before Sykes J.(Ag); that is, that she was not aware of the proceedings or the notice for the Assessment of Damages.

In seeking to comply with the provisions of rule 39.6 (3) Miss Dunn in her Affidavit sworn to on 26th May, 2004 also makes the bald statement:

> "That based on my said affidavit (one of those before Sykes J.(Ag)) I verily believe that had I attended at the trial it is likely that some other judgment or order might have been given or made."

She does not suggest the alternative order that would have been likely to have been made.

Mrs. Gibson-Henlin submitted the following argument in support of the application. I hope my summation of it does it no injustice:

(a) A hearing for the Assessment of Damages is a trial for the purposes of the application. The result of the exercise is a final judgment and therefore rule 39.6 applies to the present application.

(She relied on the Authority of Leroy Mills vs Roland Lawson & Keith Skyers (1990) 27 JLR 196 in support of this proposition.)

(b) Under rule 39.6 the basis of the application is whether Miss Dunn has a good reason for failing to attend the hearing of the assessment of damages and that had she attended the likelihood was that some other order or judgment would have been entered.

(c) The application was made promptly upon Miss Dunn being made aware of the judgment. Out of an abundance of caution however there is an application for an extension of time to make the application to set aside the default judgment.

(d) There is a difference between the approach of the court when the applicant was not aware of the hearing from that when the applicant consciously did not attend.

(She cited the case of Shocked v Goldschmidt [1998] 1 ALL ER 372 as authority for this principle).

(e) Parties, generally speaking, have a right to be heard and Miss Dunn should be afforded this right.

In assessing the submission one needs to examine rule 39.6 of the CPR which states as follows:

> "(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-
>
> (a) a good reason for failing to attend the hearing; and
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

The difficulty with Mrs. Gibson-Henlin's submission is that it seeks to focus entirely on the assessment of damages and to ignore the previous proceedings. If the submissions were correct it would mean that it would be easier for a defaulting defendant to set aside a final judgment than he could an interlocutory judgment.

Such a defendant who had deliberately allowed a default interlocutory judgment to be entered against him could have a final judgment set aside as long as he could prove that he did not deliberately absent himself from the hearing of the assessment of damages.

It is my view that this is not permissible.

Rule 39.6 (3) prevents such a perverse result. The question to be asked is; what other order would have been made if the defendant had attended the hearing of the assessment of damages.

It most certainly would not be the setting aside of the interlocutory default judgment. Rule 12.13 restricts a defaulting defendant in the areas on which he may be heard. It says as follows:

> " Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are-
> (a) costs;
> (b) the time of payment of any judgment debt;
> (c) enforcement of the judgment; and
> (d) an application under rule 12.10 (2)"

(Rule 12.10 (2) speaks to an application for permission to enter a default judgment. It may be that the reference to rule 12.10 (2) is incorrect as rule 12.13 deals with a time period subsequent to the entry of the default judgment.)

The point however, is that Miss Dunn even if she had attended the hearing of the assessment of damages could not have secured an order other than that which was made except in those restricted areas. She could of course have applied for an adjournment to allow for an application to set aside the default judgment to be heard. I however doubt that that is the type of difference in order, which was contemplated by rule 39.6

On this basis alone therefore I find that she has not satisfied the requirements of rule 39.6 (3) (b) and her application should fail.

It is interesting to note that in the English Civil Procedure Rules, their provision (R39.3) concerning an application for setting aside after non-attendance at a trial bears a striking resemblance to our rule 13.3. The English rule seems to emphasize greater stringency at the stage of non-attendance after the trial. I am however of the view that that fact does not affect my reasoning stated above.

On looking at Miss Dunn's application from a broader perspective am I permitted to take into account the view of my learned brother Sykes J. (Ag.) in the previous application? He had the benefit of seeing and hearing the witnesses. I did not. He came to the very clear finding that Miss Dunn was not to be believed in her assertions that she was not served personally with the Writ of Summons and the re-issued Notice of Assessment of Damages. Sykes J. (Ag.) found that Miss Dunn knew of the judgment and did nothing.

Although this is in fact a fresh hearing, I am of the view that I can properly make reference to the finding of the learned judge. Apart from the aspect of the cross examination, he had the very same evidence before him as I presently have. I have found no reason to disagree with his findings on

the facts. I also find that Miss Dunn did not have a good reason for failing to attend the hearing of the assessment of damages.

On this aspect the application would also fail.

For the reasons stated above therefore it is hereby ordered that:

(1) The application set out in the Notice of Application for court orders dated 26th May 2004 to set aside the Judgment herein is hereby refused.

(2) Costs to the Claimant in the sum of $16,000.00 and are to be paid by the defendant before any further application may be made by her in this matter.

(3) Leave to appeal granted.

(4) Application for stay pending appeal refused.